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VERSUS Illinois

| Date | Proceedings and Orders |
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| Mar 29 1984 | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| Jun 28 1984 | Order extending time to file response to petition until July 30, 1984. |
| Jul 30 1984 | Brief of respondent Illinois in opposition filed. |
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| Oct 9 1984 | The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.) |

# PETITION FOR WRIT OF CERTIORARI

No. 83-6832

IN THE

SUPREME COURT OF THE UNITED STATES

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MAY TERM, 1984

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DUBLYN EDMONDS,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

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## QUESTIONS PRESENTED FOR REVIEW

1. Does due process allow the State to try a defendant and sentence him to death without affording him a fitness hearing even though the trial court twice ordered that a fitness hearing be held after receiving psychiatric opinions that the defendant was unfit?

2. Does the Eighth Amendment permit the execution of a defendant where the trier of fact found that he did not intend to take a life?

3. Does a death penalty statute violate the Eight Amendment where, after a defendant is found eligible for a death sentence, it places the burden on the defendant to prove that sentence inappropriate and it requires the sentencer to impose a death sentence if no mitigation is presented?

4. Does a death penalty statute which vests unbridled discretion in the prosecutors as to whom shall be subject to the death penalty violate the Eighth Amendment, as a majority of the Illinois Supreme Court now believes?



## TABLE OF CONTENTS

TABLE OF AUTHORITIES





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INTRODUCTION

Durlyn Eddmonds, petitioner, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Illinois affirming his convictions of murder and deviate sexual assault and the sentence of death following his bench trial and sentencing hearing.

OPINION BELOW

The opinion of the Illinois Supreme Court is found at 461 N.E. 2d 347. A copy of the opinion appears as Appendix A. The Order Denying Rehearing is in Appendix B.

STATEMENT OF JURISDICTION

This court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3). The opinion of the Supreme Court of Illinois was filed on January 20, 1984. A timely petition for rehearing was filed and subsequently denied on March 30, 1984. This petition is being filed within sixty days of the denial of the rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

## STATEMENT OF THE CASE

On November 3, 1977, Durlyn Eddmonds was charged by information with murder and deviate sexual assault. (C. 590-595) A psychiatric examination was ordered and held on December 5, 1977. Dr. Robert Reifman, a psychiatrist, submitted a report to the court finding that Mr. Eddmonds was not mentally fit to stand trial, that he was unable to cooperate with counsel in his defense because he suffered from schizophrenia, and that he was in need of mental treatment. (C. 604) The public defender then moved for a fitness hearing by jury and the court ordered a jury fitness hearing on January 12, 1978. (C. 602-603; Vol. 2, R. 46)

On that date the court received the report of another psychiatrist, Dr. Jewitt Goldsmith, stating his opinion that Eddmonds was fit for trial. (C. 605) The court ordered that a third psychiatrist, Dr. Albert Stipes, examine Mr. Eddmonds. Dr. Stipes reported his conclusions that Eddmonds was unfit for trial, that he suffered from schisophrenia, paranoid type, and



psychotic depressive reaction and that he may have been schizophrenic for many years. (Supplement to the Record) Based on this report and on Dr. Reifman's report, the public defender again moved for a fitness hearing by jury. (C. 602) The court granted the motion and ordered such a fitness hearing to be held on March 9, 1978. (Vol. 2, R. 53)

After the hearing had been continued to May 25, 1978, the public defender informed the court that Dr. Reifman wished to examine Eddmonds once more in preparation for his testimony at the fitness hearing. (Vol. 2, R. 55) Dr. Reifman subsequently reexamined Mr. Eddmonds. On June 13, 1978, the court received Dr. Reifman's second report stating his opinion that Eddmonds was fit to stand trial with medication. (Vol. 3, R. 2)

After several more continuances, the public defender appeared before the court on March 14, 1979, and indicated that the parties were unclear as to whether Mr. Eddmonds had been declared unfit and had subsequently been found restored to fitness. The prosecutor stated, "If the Defendant has been restored, we would make a motion to reinstate and redocket the case." The cause was continued for further clarification. (Vol. 2, R. 59-60) On April 4, 1979, the public defender told the court that a motion for restoration had never been made. He requested that Mr. Eddmonds be examined again, stating: "In my own mind, there is a legitimate question as to whether or not Mr. Eddmonds is fit for trial at this point." (Vol. 2, R. 63)

Dr. Gerson Kaplan examined Eddmonds and reported his opinion on April 10, 1979 that he was fit for trial. Thereafter, the court granted a motion for the appointment of counsel other than the public defender. (Vol 2, R. 66-67, C. 578) Newly-appointed counsel never renewed the request for a fitness hearing. A different judge was then assigned to the case before trial.

A hearing on motions to quash arrest and suppress statements was held on June 16, 1980, followed immediately by the bench trial. Durlyn Eddmonds testified at both the hearing and the trial. (R. 102, 305) The main evidence used to convict Eddmonds at trial consisted of his statements which had been the subject of his suppression motion. (R. 188, 235-254) In those alleged

statements. Eddmonds recounted how he had sex with a nine year old boy who suffocated during the act. Eddmonds said that he smothered the boy without realizing it by pushing his face into a pillow during the act. He noticed the boy was not breathing properly and he turned him over and tried to give him mouth to mouth resuscitation. (R. 244) He told the authorities that he had not meant for the boy to die, that he tried to revive the boy, and that his death had been an accident. (R. 206-207)

After the court found Eddmonds guilty of murder and deviate sexual assault, (R. 469-471) a bench sentencing hearing was held. In imposing a death sentence for murder, the court found that Eddmonds killed the child with knowledge that the acts which caused death created a strong probability of death or great bodily harm. (R. 569) The court found that there were no mitigating factors sufficient to preclude imposition of the death penalty. (R. 571)

In a four to three decision, the Illinois Supreme Court affirmed the convictions and the sentence of death. The dissenters would have granted a new trial on the ground that Eddmonds' statements were the fruits of an arrest made in violation of the Fourth Amendment. People v. Eddmonds, 461 N.E. 2d 347, 360-361 (1984).

The court rejected petitioner's claim that due process was violated by the failure to hold a fitness hearing after the trial court twice found a bona fide doubt of fitness and order hearing. 461 N.E. 2d 351-353. The court also rejected petitioner's claims concerning the constitutionality of the Illinois Death Penalty Act and of the death sentence imposed. 461 N.E. 2d 25 358-359.

A petition for rehearing was denied on March 30, 1984.

THE MANNER IN WHICH THE CONSTITUTIONAL CLAIMS WERE RAISED

The fact that there was a bona fide doubt of fitness was brought to the trial court's attention twice before trial. Each time the court ordered that a fitness hearing be held. (C. 602-603, Vol. 2, R. 46, 53) The due process violation in failing to hold a fitness hearing was briefed before the Illinois Supreme Court. 461 N.E. 2d 360.



The failure of the State to prove the requisite mental state for the death penalty was argued to the trial court (R. 487-488, 550-551) and briefed before the Illinois Supreme Court. 461 N.E. 2d 358. The constitutionality of the Illinois Death Penalty Act was briefed before the Illinois Supreme Court. 461 N.E. 2d 358-359.

REASONS FOR ALLOWANCE OF THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER DUE PROCESS PERMITS A STATE TO TRY A DEFENDANT AND SENTENCE HIM TO DEATH WITHOUT AFFORDING HIM A FITNESS HEARING EVEN THOUGH THE TRIAL COURT TWICE WAS PRESENTED WITH EVIDENCE OF A BONA FIDE DOUBT OF FITNESS AND EACH TIME ORDERED THAT A FITNESS HEARING BE HELD.

In Pate v. Robinson, 383 U.S. 375 (1966), the Court held that due process requires that a fitness hearing be held before trial whenever a bona fide doubt of fitness arises. Illinois has codified the Pate holding in Ill. Rev. Stat., 1979, Ch. 38, Sec. 104-11(a): "When a bona fide doubt of defendant's fitness is raised, the court shall order a determination of the issue before proceeding further."

In the present case, after Mr. Eddmonds was arrested and formally charged, the court ordered a psychiatric examination and Dr. Reifman submitted a report that Mr. Eddmonds was unfit to stand trial, that he was unable to cooperate with counsel because he suffered from schizophrenia, and that he was in need of mental treatment. (C. 604) Pursuant to this report and at the request of the public defender, (C. 612) the court ordered and set a date for a fitness hearing by jury. (C. 602-603; Vol. 2, R. 46) By ordering the hearing, the court had "ipso facto determined the existence of [a bona fide] doubt." People v. T.D.W., 109 Ill. App. 3d 852, 441 N.E. 2d 135, 137 (4th Dist., 1982).

The hearing was not held on the appointed date because the court received a conflicting report from Dr. Goldsmith that Mr. Eddmonds was fit for trial. (C. 605) The court ordered that a third psychiatrist make an examination. Dr. Stipes then submitted his opinion that Mr. Eddmonds suffered from schizophrenia - paranoid type and from psychotic depressive reaction. He believed "this man may have been schizophrenic for many years. He now shows evidence of severe depression, hallucinations and

hopelessness." Dr. Stipes concluded that Mr. Eddmonds was unfit for trial. He noted that Eddmonds was given thorazine twice a day at the jail. (Supplement to the Record)

This report led the trial court to again order a fitness hearing by jury. (Vol. 2, R. 53) After several continuances Dr. Reifman was allowed to examine Mr. Eddmonds again in preparation for his testimony at the fitness hearing. (Vol. 2, R. 55, C. 608) Dr. Reifman later submitted his second report, this time stating that Mr. Eddmonds was "mentally fit to stand trial with medication." (Vol. 3, R. 2)

After the court received this report several more continuances were obtained and there was no mention of a fitness hearing until eight months later in March of 1979. At that time the public defender and the prosecutor indicated that they had believed that Mr. Eddmonds had been declared unfit for trial and the question became whether there had been a hearing on Mr. Eddmonds' restoration to fitness. (Vol. 2, R. 59-60) After further investigation, the public defender told the court that no "restoration order" had ever been signed by the court. (Vol. 2, R. 62-63) The court again ordered a psychiatric examination after the public defender stated: "In my own mind, there is a legitimate question as to whether or not Mr. Eddmonds is fit for trial at this point." (Vol. 2, R. 63-64)

The court later received Dr. Kaplan's report opining that Mr. Eddmonds was fit for trial. (Vol. 2, R. 66-67; Vol. 3, R. 3) No further mention was ever made of the fitness question. New counsel was appointed to represent Mr. Eddmonds and a new judge was assigned to try the case. The trial occurred thirteen months after Dr. Kaplan's report was received by the court.

In its analysis of the issue, the Illinois Supreme Court ignored the fact that the trial court had twice ordered a fitness hearing by jury after hearing evidence of a bona fide doubt of fitness. The court also ignored the public defender's statement of his belief that Eddmonds was unfit. It further ignored the significance of the fact that Mr. Eddmonds was apparently



supposed to be receiving a psychotropic drug, thorazine.[1] Instead, the Illinois Supreme Court treated the issue as if no bona fide doubt had ever been found in the trial court and, upon its review of the record, it found that the trial court did not abuse it discretion in failing to find the existence of a bonda fide doubt. People v. Eddmonds, 481 N.E. 2d 347, 353 (1984).

This analysis was constitutionally erroneous because the trial court twice found a bona fide doubt to exist and it twice ordered fitness hearings. Moreover, these findings were based on strong evidence of unfitness. This Court should grant certiorari to correct this blatant violation of due process of law.

The similarity between the error the Illinois Supreme Court made in this case and the error it made in People v. Robinson, 22 Ill. 2d 142, 174 N.E. 2d 820 (1961), which this Court corrected in Pate v. Robinson, 383 U.S. 375 (1966) is striking. In Robinson the trial court had before it opinions of the defendant's family that he was unfit "based largely upon incidents occurring many years before the trial." People v. Robinson, 174 N.E. 2d at 823. In finding that the testimony of these family members did not raise a bona fide doubt of fitness for trial, the Illinois Supreme Court pointed to the fact that there had been a stipulation that a psychiatrist would testify that the defendant was fit for trial and to the defendant's behavior at trial where his statements displayed "mental alertness as well as understanding and knowledge of the proceeding". 174 N.E. 2d at 823.

This Court found this analysis to be incorrect. It found that the testimony about Robinson's past conduct "entitled him to a hearing" because it raised a bona fide doubt.

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[1] Although the point was briefed and argued, and again argued on rehearing, the Illinois Supreme Court failed to address the significance of a portion of the Fitness Statute which states: "A defendant who is receiving psychotropic drugs or other medications under medical direction is entitled to a hearing on the issue of his fitness while under medication." Ill. Rev. Stat., (1979), Ch. 38, Sec. 104-21(a). One Illinois court has held that this statute mandates a fitness hearing if the trial judge learns of the use of the drug prior to trial. People v. Tilson, 106 Ill. App. 3d 973, 436 N.E. 2d 1246, 1311 (2nd Dist., 1982).

> The Supreme Court of Illinois held that the evidence here was not sufficient to require a hearing in light of the mental alertness and understanding displayed in Robinson's "colloquies" with the trial judge. But this reasoning offers no justification for ignoring the uncontradicted testimony of Robinson's history of pronounced irrational behavior. While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue. (Citation omitted) Likewise, the stipulation of Dr. Haines' testimony was some evidence of Robinson's ability to assist in his defense. But on the facts presented to the trial court it could not properly have been deemed dispositive on the issue of Robinson's competence. Pate v. Robinson, 383 U.S. at 385-386.

In the present case, the Illinois Supreme Court finds that the "only evidence of defendant's unfitness for trial were reports by one doctor who subsequently changed his opinion, and of another doctor whose report of unfitness was made more than two years before trial." Arrayed against this evidence were more recent psychiatric reports which "tended to show that defendant was fit", the fact that defense counsel "made no further request for a fitness hearing" and the finding by the Illinois Supreme Court that the "defendant testified lucidly" at the suppression hearing and the trial. People v. Eddmonds, 461 N.E. 2d at 353. As is readily apparent, the analysis here has the same flaw as the analysis in People v. Robinson, supra, in that it attempts to justify the absence of a hearing by pointing to evidence which would be relevant at the fitness hearing but which could not be "deemed dispositive" or "relied upon to dispense with a hearing". Pate v. Robinson, 383 U.S. at 386, once the trial court had found a bona fide doubt and ordered a fitness hearing on two occasions.

The fact that defense counsel failed to make a "further request" for a fitness hearing cannot be dispositive. Each time the court received a report of unfitness the public defender requested a fitness hearing by jury. After each request, the trial court entered an order for a fitness hearing by jury. These orders were never withdrawn, yet no fitness hearing was held. In Pate v. Robinson no request for a fitness hearing was ever made. The Court found this factor insignificant: "But it is contradictory to argue that a defendant may be incompetent, and



yet knowingly or intelligently 'waive' his right to" a fitness hearing. 383 U.S. at 384. Here, where two requests were made and ruled upon favorably, the fact that an additional request was not made simply cannot act as a bar to the required hearing.

The opinion of the Illinois Supreme Court fails to apply the due process standard announced in Pate v. Robinson. The opinion is in conflict with Pate v. Smith, 637 F. 2d 1068 (6th Cir. 1981), which holds that once evidence of a bona fide doubt is received, the trial judge may not dispense with a hearing by looking to other evidence of fitness of record. See also U.S. ex rel. Wireles v. Greer, 528 F. Supp. 1122 (N.D. Ill. 1981). The opinion ignores the significance of the fact that Mr. Eddmonds was receiving psychotropic medication, a fact at least one court has found to call for a fitness hearing. Acosta v. Turner, 666 F. 2d 949, 955 (5th Cir., 1982). These infirmities in the opinion must be addressed.

Durlyn Eddmonds has been sentenced to death in a proceeding which, due to the failure to first hold the required fitness hearing, lacks the high degree of reliability necessary in proceedings leading to the infliction of the death penalty. Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

For these reasons, this Court should grant certiorari and reverse Mr. Eddmonds' convictions.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A QUESTION POSED BY MR. JUSTICE WHITE'S CONCURRENCE IN LOCKETT V. OHIO, 438 U.S. 586, (1978) AND LEFT UNDECIDED BY EDMUND V. FLORIDA, 458 U.S. 782 (1982): WHETHER THE EIGHTH AMENDMENT PERMITS THE EXECUTION OF A DEFENDANT FOR MURDER WHERE THE KILLING WAS UNINTENTIONAL.

The only evidence presented in this case as to how the murder occurred, the statements of the defendant, shows that the killing was unintentional. The defendant explained that when he put the weight of his body onto the body of the boy, he "was smothering him without really knowing it." (P. 244) When the defendant realized the boy wasn't breathing properly, he turned the boy over and gave him mouth to mouth resuscitation, only to

discover that the boy was dead. (R. 244) At other points in his confessions, the defendant said that "he had not meant for the victim to die" (R. 206) and that he "tried to revive the victim and couldn't." (R. 207) There was no evidence of record to contradict the defendant's statements.

The trial judge, in imposing sentence, rejected the State's argument that the killing was intentional. Instead, the judge found that the defendant performed the acts which caused death with the knowledge that those acts created a strong probability of death or great bodily harm. (R. 569)

In affirming the death sentence, the Illinois Supreme Court held that "knowledge that the proscribed conduct has created the strong probability of death or great bodily harm to the victim is sufficient and proof of specific intent has not been required" for the imposition of the death penalty. 441 N.E. 2d at 358. This holding violates the Eighth Amendment.

In his concurrence in Lockett v. Ohio, 438 U.S. 586 (1978), Mr. Justice White found "that it violates the Eighth Amendment to impose the penalty of death without finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624. Mr. Justice White stated that such punishment for one who did not intend to kill the victim is disproportionate and thus cruel and unusual because it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering and because it is grossly out of proportion to the severity of the crime. 438 U.S. at 624.

In Enmund v. Florida, 458 U.S. 782 (1982), this Court was not required to resolve the question now presented. Instead, this Court vacated Enmund's death sentence on the more limited ground that death is not a constitutional penalty for one who neither killed, attempted to kill nor intended to take a life. 458 U.S. at 797.

Since the Enmund decision, however, the United States Court of Appeal for the Fifth Circuit has held in Clark v. Louisiana State Penitentiary, 694 F. 2d 75 (1982), that, even where there was evidence that the defendant did the actual killing, because



the jury was not required to find that the defendant killed or possessed an intent to kill, the Eighth Amendment, as interpreted in Enmund, does not permit his execution. 694 F. 2d at 76-77. The court stated:

> Before the Constitution will allow this conviction and sentence, however, we must know that the jury found beyond any reasonable doubt that Clark, personally, did have that mind to kill....We are left with "a level of uncertainty and unreliability [in] the fact finding process that cannot be tolerated in a capital case." Peek v. Alabama, (citations omitted).

694 F. 2d at 78.

The decision of the Fifth Circuit is obviously at odds with the holding of the Illinois Supreme Court in this case. Here, in fact, the trial judge specifically rejected the finding of an intentional killing and, thus, under the Fifth Circuit's interpretation of Enmund, that rejection should bar the imposition of the death penalty.

This Court should grant certiorari to resolve the important constitutional question left open in Enmund of whether the punishment of death for an unintentional killing violates the Eight Amendment.

III. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A DEATH PENALTY STATUTE WHICH PLACES THE BURDEN ON THE DEFENDANT TO PROVE A DEATH SENTENCE INAPPROPRIATE AND WHICH MAKES A DEATH SENTENCE MANDATORY IF NO MITIGATION IS PRESENTED IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

Imposition of the death penalty under the Illinois statute, as under death penalty statutes in many other states, requires a preliminary determination of the existence of one or more enumerated aggravating factors and, once a defendant is thereby found eligible, an evaluation of evidence in aggravation and mitigation. Ill. Rev. Stat., 1979, Ch. 38, Sec. 9-1(b),(g), and (h). The Illinois statute then provides:

> If the court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

> Unless the court finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the court shall sentence the death to a term of imprisonment...
>
> Ill. Rev. Stat., 1979, Ch. 38, Sec. 9-1(h).

The Illinois death penalty statute thus creates a rebuttable presumption at the second phase of the sentencing hearing that death is the appropriate punishment. The defendant is assigned the burden of adducing "mitigating factors sufficient to preclude the imposition" of that punishment. The defendant in the case at bar presented the testimony of a psychiatrist at the sentencing hearing, but he "was unable to render an opinion whether, at the time of the offense was committed, defendant was under the influence of an extreme mental or emotional disturbance." People v. Eddowds, 441 N.E. 2d 347, 351 (1984). The trial judge therefore "found no mitigating factors sufficient to preclude the imposition of the death penalty" and imposed the death sentence. Id.

The Illinois statute violates the Eighth and Fourteenth Amendments by requiring "defendants to bear the risk of nonpersuasion as to the existence of [sufficient] mitigating circumstances in capital cases" Lockett v. Ohio, 438 U.S. 586, 609 n. 16 (1978)[1], and by making the death penalty mandatory if there are no mitigating factors presented.

The Court's precedents have clearly established that a capital sentencing procedure which interfers with the determination of whether death is an "appropriate punishment in a specific case" is unconstitutional. Lockett, supra, 438 U.S. at 601. Statutes requiring mandatory death sentences are unconstitutional. Roberts v. Louisiana, 431 U.S. 633 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976). Statutes which prohibit consideration of relevent mitigating factors are also unconstitutional. Lockett v. Ohio; See also Eddings v. Oklahoma, 455 U.S. 104, (1982). A death penalty statute

[1] In Lockett, the Court specifically left open the question of whether the Ohio death penalty was unconstitutional for the same reason.



which places the risk of nonpersuasion on the defendant interferes with the sentence's role in an equally improper manner, albeit more subtly, because it also creates an undue chance that a death sentence will be imposed where it is not appropriate.

The Court has observed that the allocation of a burden of proof artifically enhances the liklihood of error against the party who bears the burden. Speiser v. Randall, 357 U.S. 513, 525-526 (1958). See also McCormick on Evidence, Sec. 341, pp. 798-99 (2d Ed. 1972). Therefore, "[where] one party has at stake an interest of transcending value -- as a criminal defendant his liberty -- this margin of error is reduced as to him by the process of placing on the other party the burden...of proof..." Speiser, supra. This reflects society's judgment that it is significantly worse for an innocent man to be found guilty than for guilty man to go free. McCormick on Evidence, supra. Thus in a death penalty proceeding, there can be no question that the burden of proof, if any, must be placed on the State rather than the defendant.

Lockett, Eddings, Woodson and Roberts, supra, established that capital punishment may be imposed only where "appropriate." This Court should not allow the need for reliability in the imposition of capital punishment to be circumvented by a statute which places the burden of proof and risk of error on the defendant. "The power to create presumptions is not a means of escape from constitutional restrictions." Speiser, supra, citing Bailey v. Alabama, 219 U.S. 219, 239 (1911).

Moreover, the Court should now review the Illinois statute because, since the instant case was decided, the Illinois Supreme Court has held that the death penalty is mandatory where, as here, no meaningful mitigation was presented. The statute as so interpreted violates the dictates of Roberts v. Louisiana, 431 U.S 633 (1977) and Woodson v. North Carolina, 428 U.S. 280 (1976).

In People v. Ruble Owens, ___ Ill. 3d ___ (No. 56453, March 29, 1984), the Illinois Supreme Court upheld a death sentence, finding:

The court also found no mitigating factors were present. In these circumstance, where a single aggravating factor is found, with no mitigating factor to be weighed against it, section 9-1(h) requires imposition of the death sentence: "If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death." (Emphasis added.) Ill. Rev. Stat., 1979, ch. 38 par. 9-1(h).) We have previously interpreted as mandatory the emphasized language in the context of the parallel provision in section 9-1(g) which governs procedure when the defendant elects to have a jury make the sentencing decision. In People v. Gaines (1981), 88 Ill. 2d 342, 373, cert. denied (1982), 454 U.S. 970, 72 L. Ed. 2d 481, 102 S. Ct. 2261, we held, based upon our prior decision in People v. Lewis (1981), 88 Ill. 2d 129, 150-51 (1981), "[t]wo sentencing options were available to the court, for it was required to sentence the defendant to death after the jury returned a verdict that there were no mitigating factors sufficient to preclude that sentence." (Emphasis added.) Since the legislature has chosen to use the same restrictive language in both section 9-1(g), which governs sentencing by juries, and section 9-1(h), which governs sentencing by the court, we now hold that section 9-1(h) similarly curtails judicial discretion. When there is no mitigating factor for the court to weigh against an aggravating factor that has been found to exist beyond a reasonable doubt, the statute obligates the judge to impose the death sentence, as the sentencing court here observed.

People v. Owens, slip op., p. 17.

By mandating a death sentence where no mitigation is presented, the Illinois Death Act prohibits the sentencer from electing not to impose the death penalty even if the sentencer believes the penalty is inappropriate.

For the two reasons presented, the Court should grant certiorari and vacate Mr. Edmonds' death sentence.

## IV. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A DEATH PENALTY STATUTE WHICH VESTS UNBRIDLED DISCRETION IN THE PROSECUTORS AS TO WHOM SHALL BE SUBJECT TO THE DEATH PENALTY VIOLATES THE EIGHTH AMENDMENT AND TO RESOLVE THE INSOLUBLE CONFLICT IN THE ILLINOIS SUPREME COURT WHICH WOULD BE HELD BUT FOR ITS UNIQUE APPLICATION OF STARE DECISIS.

After a conviction for murder, a death penalty hearing in Illinois can be held only "[w]here requested by the State." Ill. Rev. Stat., 1977, Ch. 38 Section 9-1(d). The Supreme Court of Illinois recognized that this statutory language places the



decision on whether to convene a death hearing solely and squarely in the hands of the Illinois prosecutors. People ex. rel. Carey v. Cousins, 77 Ill. 2d 531, 397 N.E. 2d 809 (1979) No other jurisdiction grants such authority on what is basically a judicial issue to the executive branch of the government.

Four of the seven Justices now sitting on the Supreme Court of Illinois believe that the Illinois statute violates the Eighth Amendment. See People v. Lewis, 88 Ill. 2d 129, 430 N.E. 2d 1346 (1981).

In the Cousins case, three Justices -- Ryan, Clark, and Goldenhersh -- joined in a dissent. All three opined that giving the Illinois prosecutor the crucial decision, without any guiding standard, as to whom shall be spared from the ultimate penalty, violated the Eighth Amendment. A fourth, Mr. Justice Simon, adopted this position in Lewis and has adhered to it in subsequent cases. Although the three Cousins dissenters reaffirmed their views in Lewis, each refused to join Justice Simon because they felt bound by stare decisis. People v. Lewis, 430 N.E. 2d at 1364. (Chief Justice Goldenhersh and Justices Ryan and Clark, concurring).

In Gregg v. Georgia, 428 U.S. 153 (1976) this Court explained the holding in Furman v. Georgia, 408 U.S. 238 (1972) noting that Furman prohibits the death penalty "under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." 428 U.S. at 188.

Because a majority of the Illinois Supreme Court now sitting believe that the Illinois Statute violates Gregg and Furman but three of them refuse to vote according to their beliefs due to their unique view of stare decisis, this Court should grant certiorari to resolve this insoluble conflict and to determine whether the statute violates the Eighth Amendment.

## CONCLUSION

Despite the trial court's twice finding a bona fide doubt of his fitness to stand trial, Durlyn Eddmonds has been convicted and sentenced to death without benefit of a hearing to determine his fitness to be tried and sentenced. Mr. Eddmonds has been sentenced to death for an unintentional killing. The Illinois Death Act mandated his death sentence because Mr. Eddmonds failed to present mitigation. The Illinois Act vested arbitrary discretion in the prosecutors to seek the death penalty, a fact recognized by a majority of the Illinois Supreme Court. Certiorari should be granted to address the important due process and Eighth Amendment questions raised in the proceedings below.

Respectfully submitted,

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APPENDIX A

EDITOR'S NOTE

PAGES 346 thru 361 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

bag. The box of yellow bags, viewed inside defendant's apartment, was later retrieved by the police, pursuant to a written consent form signed by defendant's grandmother. Johnson testified that after defendant admitted he had handled the child's clothing he was no longer free to leave the station house.

Defendant's version of the occurrences of that day, and of how he met the police at his home, is similar to that of the State, but he adds that when he left with the officers he was under the influence of alcohol and drugs. Defendant also asserts that he was interrogated by the officers before telling them a story that he "felt might suit what they wanted."

Relying on *Dunaway v. New York* (1979), 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824, defendant argues that he was illegally arrested when, without probable cause, he was taken to the police station and interrogated at various times for a period of more than 10 hours. He contends that because his admissions were the product of an unlawful detention, they should have been suppressed pursuant to his motion. *People v. Townes* (1982), 91 Ill.2d 32, 36, 61 Ill.Dec. 614, 435 N.E.2d 109.

In *Townes*, the defendant was asked to accompany police officers to the station house for questioning about an assault on a woman. He was given the choice of accompanying the officers in the police car or driving his own car to the station. Defendant rode with the policemen, arriving at the station at 9:30 a.m. After informing him of his constitutional rights, the police conducted a series of interviews. During the first few interviews, the defendant gave an explanation for his whereabouts at the time of the crime and explained away the apparent injuries, which were inconsistent with those described by the victim of the offenses. Between 5 p.m. and 10:10 p.m. of that same day, a final interview was conducted with the defendant during which he admitted having sexual relations with the victim, but maintained that they were consensual.

In *Townes*, the State conceded that the police lacked probable cause to arrest Townes at the time they visited his residence. They argued, however, that Townes was never "seized" and, thus, probable cause was unnecessary. The State contended that defendant acted voluntarily and that his statements were admissible.

The court held that the 12 hours of questioning to which defendant was subjected exceeded constitutional bounds and that his alleged voluntary cooperation did not purge the taint of an illegal detention. (91 Ill.2d 32, 35-36, 61 Ill.Dec. 614, 435 N.E.2d 109.) It was concluded that a defendant could not be subjected to a lengthy interrogation at the police station without probable cause.

(2, 3) We find this case distinguishable from *Townes* and, for the reasons to follow, find that defendant's statements were not taken in violation of his fourth amendment rights. We consider first the State's contention that the police had probable cause to detain defendant upon their third visit to his apartment to bring him to the station. It is well established that, under the standard used to determine whether probable cause to arrest exists, police officers need not possess evidence sufficient to convict a defendant. (See, *e.g.*, *People v. Moody* (1982), 94 Ill.2d 1, 7, 67 Ill.Dec. 785, 445 N.E.2d 312; *People v. Lippert* (1980), 89 Ill.2d 111, 118, 59 Ill.Dec. 810, 432 N.E.2d 838; *People v. Morton* (1979), 76 Ill.2d 502, 511, 394 N.E.2d 1182.) Rather, they need only have knowledge of facts which would lead a reasonable man to believe that a crime has occurred and that it has been committed by the defendant. (*People v. Reynolds* (1982), 94 Ill.2d 188, 195, 68 Ill.Dec. 102, 445 N.E.2d 769; *People v. Lippert* (1982), 89 Ill.2d 111, 119-19, 59 Ill.Dec. 810, 432 N.E.2d 838; *People v. Crouch* (1980), 79 Ill.2d 66, 102, 37 Ill.Dec. 839, 402 N.E.2d 228, *cert. denied* (1980), 449 U.S. 1018, 101 S.Ct. 584, 66 L.Ed.2d 467; *People v. Robinson* (1978), 72 Ill.2d 210, 218-11, 380 N.E.2d 804.) Application of that standard to the facts in this case clearly demonstrates that the police had probable cause to arrest defendant at the time that he voluntarily accompanied them to the station house.

When the investigating officers returned to defendant's apartment the third time, they were aware of the following facts: (1) the victim's body had been found in a garbage dumpster in the alley directly behind defendant's apartment; (2) the victim had probably been sexually molested; (3) the defendant was a previous sex offender; (4) the defendant lived in a second-floor apartment and a blood-stained sock had been found on the second-floor landing of defendant's apartment building; (5) the sock matched a cream-colored sock found in a yellow plastic bag, along with the victim's clothing, about a block and a half from defendant's apartment; and (6) the yellow plastic bag resembled a yellow plastic bag viewed inside defendant's apartment.

When viewed in their totality, these facts and circumstances, known to the investigators, at the time defendant went to the station house, were certainly sufficient to warrant the reasonable belief that an offense had been committed and that defendant had committed the offense. As such, the situation presented by these facts is quite different from that in *Townes*, where probable cause to arrest did not exist at the outset of questioning but, rather, arose only after a lengthy detention and interrogation.

The instant case is also distinguishable from *Townes* in that Townes was subjected to more than 12 hours of interrogation before he made the inculpatory statement which provided the probable cause for a legal arrest. In the case at bar, the defendant admitted handling the victim's clothing at the beginning of the interrogation, at which time the officers testified, defendant was no longer free to leave. In any event, *Townes* is inapposite because the record in this cause reveals that defendant was not under arrest at the time that he made the incriminating statement which, in conjunction with the other facts known to the police, gave rise to the probable cause for defendant's arrest.

(4, 5) Defendant also argues that the trial court erred in finding that his statements were not involuntary because they were the product of an illegal arrest. (See *Dunaway v. New York* (1979), 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824; *Brown v. Illinois* (1975), 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416.) The ultimate question of whether or not a confession is voluntary is largely within the discretion of the trial court (*People v. Murphy* (1978), 72 Ill.2d 421, 431, 21 Ill.Dec. 268, 381 N.E.2d 671). At the time of trial, in June of 1980, the court considered psychiatric reports available to the court tended to show that defendant was fit for trial. Defendant's counsel made no further request for a fitness hearing. In addition, defendant testified lucidly at both the hearing on his motion to suppress evidence and at his trial. Defendant testified concerning the events preceding his making statements to the police and his version of his involvement with the victim. The record shows that his answers to questions were to the effect that his confessions were not voluntary and that he denied he was guilty of the charges. The only evidence of defendant's unfitness for trial were reports by one doctor who subsequently changed his opinion, and of another doctor whose report of unfitness was made more than two years before trial.

"[T]he determination of whether there is a bona fide doubt of fitness for trial depends on the facts of each case." (*People v. Murphy* (1978), 72 Ill.2d 421, 430, 21 Ill.Dec. 268, 381 N.E.2d 671.) On this record we cannot say that the circuit court erred in failing to order, *sua sponte*, another fitness hearing.

Defendant contends that his statements made while in police custody were taken in violation of his fourth amendment rights and should have been suppressed. He argues that the statements were against him at trial were the product of an illegal arrest, that he was placed under arrest at the time he was brought to the police station, and, at that time, the officers did not have probable cause to arrest him. The State contends that defendant voluntarily accompanied the officers to the police station for questioning, and that his arrest occurred only after he incriminated himself by mentioning that he had handled the victim's clothing. Alternatively, the State argues that at the time defendant was picked up at his apartment, or his request, there was probable cause to arrest him.

According to the testimony adduced at the hearing on defendant's motion to suppress, Officers Willie Johnson and Officer Jordan recovered the neighborhood where the body was found. The officers spoke with defendant and the grandmother who resided in the second-floor apartment directly over the landing where a child's blood, sock was found. Defendant told the police that he knew nothing concerning the [illegible] child. A few days later, after a thorough investigation, the police received information from another police officer that defendant was a former sex offender. Officers John and Jordan returned to defendant's apartment. Defendant was not at home and the officers left a card with defendant's grandmother to have defendant call them when he arrived. Defendant returned to the apartment a short time later and left with the police officers to go to the police station. In view of these circumstances, we find that a reasonable man would believe that he was free to leave the station house and was not, therefore, under arrest.

Consideration of the facts and circumstances indicate that defendant was voluntarily in police headquarters to undergo questioning even though probable cause for his arrest then existed. In any event, the record makes entirely clear the fact that the time span between defendant's voluntary departure for the police station and the commencing statement was within permissible limits. We hold, therefore, that no valid theory, the defendant's fourth amendment rights were not violated.

(7) Defendant next argues that his death penalty cannot be imposed because the State failed to prove, beyond a reasonable doubt, that defendant intended to kill or knew that his acts created a strong probability of death or great bodily harm. Defendant argues that there was only one version of how the alleged murder occurred, and since that version negates the required mental state, it cannot be relied upon by the trier of fact to find an intent to





"In *People v. Carlson* (1980), 79 Ill.2d 564 [38 Ill.Dec. 888, 404 N.E.2d 233], the court considered whether alleged errors not objected to by defendant at trial were waived. After examining the waiver doctrine, and our Rule 615(a) (73 Ill.2d R. 615(a)), which embodies the exception to the waiver rule, the court adhered to the rule that even in the absence of objection at trial, a court of review will grant relief if the trial error is so prejudicial that real justice has been denied or the verdict of the jury resulted from such an error. (See *People v. Carlson* (1980), 79 Ill.2d 564, 574-77 [38 Ill.Dec. 888, 404 N.E.2d 233]; *People v. Wright* (1975), 60 Ill.2d 401, 405-06 [328 N.E.2d 537]; *People v. Macarello* (1975), 58 Ill.2d 481, 490 [349 N.E.2d 10].) The same rule applies whether the alleged errors occurred at trial or at sentencing."

As the court did in *Jones*, we have reviewed the transcript and the alleged errors to determine whether defendant was deprived of any of his fundamental rights.

Defendant was charged by information with murder and deviate sexual assault. Several days later, at the request of the assistant public defender, the circuit court ordered a psychiatric examination. On November 8, 1977, Dr. Endresen, of the Psychiatric Institute for the circuit court of Cook County, reported in a letter that defendant was unfit for trial. Pursuant to this report, the public defender petitioned for a fitness hearing by jury. The court ordered that a fitness hearing be held on January 13, 1978. On that date, the public defender presented to the court a report from Dr. Jewett Goldsmith of the State Department of Mental Health, stating that defendant was fit for trial. Another examination was ordered, and on January 23, 1978 Dr. Albert Stigen, a private psychiatrist, reported that defendant was unfit for trial. The public defender again petitioned the court for a fitness hearing by jury, and a hearing was set for March 6, 1978. On that date and two subsequent dates the hearing was continued by agreement.

On May 31, 1978, the public defender advised the court that he had spoken to Dr. Endresen, the author of the first psychiatric report in which it was stated that defendant was unfit to stand trial, and that the doctor had requested that he be permitted to interview defendant prior to testifying at the hearing. Defendant was subsequently reexamined by Dr. Endresen on June 6, 1978. He reported that defendant was "fit to stand trial with moderation." Defense counsel then asked the court to order a psychiatric examination to determine defendant's sanity at the time of the offenses. The record shows that the next day Dr. Conrad Kaplan of the Psychiatric Institute reported that he could give an opinion as to defendant's sanity at the time of the offenses.

A transcript of proceedings on March 15, 1979, shows that there was some confusion as to whether defendant had been declared unfit to stand trial. On April 4, 1979, defendant's counsel offered to "simplify the matter" by requesting a reexamination of defendant both as to his sanity at the time of the offenses and as to his fitness to stand trial. Examinations were ordered by the court, and defendant was reexamined by Dr. Kaplan, whose report dated April 16, 1979, stated that defendant was fit for trial.

In May of 1979, defendant, *pro se*, prepared and filed a motion asking the court to appoint an attorney from the law enforcement to represent him, rather than from the public defender's office. A new attorney was appointed for the defendant, and the newly appointed counsel promptly moved for a psychiatric examination of defendant to determine his sanity at the time of the offenses. On October 1, 1979, Dr. Kaplan reported that in his opinion defendant was sane at the time of the offenses. Defendant then asked for an examination by another doctor to obtain a second opinion concerning defendant's sanity at the time of the offenses. This examination was ordered, but no report of the results of that examination is contained in the record.

vague and discernible only after a complete review of the record. It resulted in no prejudice to defendant at trial, and we hold that counsel was not incompetent for failing to object to a vague reference to more

[15] Defendant also contends that he was denied due process when the prosecution was permitted rebuttal argument at the second phase of the sentencing hearing. Defendant argues that since the State does not have the burden of proving the absence of mitigating factors, it should not be allowed rebuttal argument. Although the issue was waived because of the failure of trial counsel to object, and is not plain error, nevertheless, we reach it in order to consider defendant's claims of ineffective assistance of counsel. We find that defendant was not denied the effective assistance of counsel due to trial counsel's failure to object to this procedure because such an objection would have been overruled. The State as the moving party in a death penalty proceeding (38 Ill.Rev.Stat.1979, ch. 38, par. 9-1(b)) and, as such, is entitled to rebuttal argument. *See Lightel v. Security Benefit Association* (1933), 356 Ill. 614, 192 N.E. 884. *See also People v. Baker* (1982), 94 Ill.2d 127, 445 N.E.2d 749, 68 Ill.Dec. 98, cert. denied 461 U.S. 947, 103 S.Ct. 2127, 77 L.Ed.2d 1307 (where this issue was raised and decided adversely to the defendant)

Defendant raises a number of constitutional challenges to the death penalty statute. The first is that the death penalty cannot be imposed where the court did not find that he "intentionally" killed the victim. Defendant contends that a sentence of death set based on an explicit finding of an intent to kill violates the eighth and fourteenth amendments. Defendant argues that a sentence of death is excessive, and thus unconstitutional, for conduct where the defendant only "knows" that his acts create a strong probability of death or great bodily harm. Defendant primarily relies upon the concurring opinion of Justice White in *Lockett v. Ohio* (1978), 438 U.S. 586, 631, 98 S.Ct. 2954, 2981, 57 L.Ed.2d 973, 1008, and *Enmund v. Florida* (1982), 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140. In that opinion, which matters no more not considered by the full court, Justice White states that a punishment is disproportionate, and thus unconstitutional, if it makes an unacceptable contribution to acceptable goals of punishment or if it is excessive in relation to the severity of the crime. *Lockett v. Ohio* (1978), 438 U.S. 586, 631, 98 S.Ct. 2954, 2981, 57 L.Ed.2d 973, 1008 (White, J., concurring).

[16] The apparent rationale of making the death penalty applicable to a murder during the commission of another felony (see 38 Ill.Rev.Stat.1981, ch. 38, par. 9-1(b)(6)) is to deter further acts of violence during the commission of those felonies. In those situations, knowledge that the premeditated conduct has created the strong probability of death or great bodily harm to the victim is sufficient and proof of specific intent has not been required. *See Gregg v. Georgia* (1976), 428 U.S. 153, 191 n. 52, 96 S.Ct. 2909, 2937 n. 52, 49 L.Ed.2d 859, 891 n. 52 (White, J., concurring). *Cf. People v. Davis* (1977), 66 Ill.2d 1, 10, 69 Ill.Dec. 336, 337, 360 N.E.2d 362 (where this court held that the statute which provides that convictions for murdering two or more individuals constitutes an aggravating factor sufficient for the imposition of the death penalty (38 Ill.Rev.Stat.1975, ch. 38, par. 9-1(b)(3)) is applicable where a defendant is convicted of two or more murders resulting from either knowing or intending acts).

[17] Defendant next argues that because the Illinois death penalty statute does not require that the State prove, beyond a reasonable doubt, the absence of mitigating factors, it is invalid. This argument fails, since it is inconsistent with this court's holding that the statute requires that a weighting process take place. *(People v. Brownell* (1980), 79 Ill.2d 488, 497-98, 38 Ill.Dec. 707, 404 N.E.2d 181; *People v. Free* (1983), 94 Ill.2d 378, 421, 69 Ill.Dec. 1, 447 N.E.2d 218.) The court stated in *Brownell*, "[W]hile the proper weight to be given each aggravating and mitigating factor is not made a matter of mathematical calculation, that is not a constitutional infirmity." (79 Ill.2d at 498, 38 Ill.Dec. at 711, 404 N.E.2d at 185.) The balancing process, as found in *Brownell*, does not require that the State bear the burden of proving the absence of the statutory mitigating factors. As stated in *Pruitt v. Florida*:

"While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* (*Furman v. Georgia* (1972), 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726) are satisfied when the sentencing authority's discretion is guided and channeled by requiring consideration of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." (*Pruitt v. Florida* (1979), 439 U.S. 940, 58 L.Ed.2d 338, 99 S.Ct. 2998, 60 L.Ed.2d 913, 999, *see People v. Jones* (1980), 84 Ill.2d 372, 49 Ill.Dec. 844, 427 N.E.2d 152.)

Neither *Furman*, nor the Constitution requires upon the State the heavy burden of proving the absence of mitigating factors beyond a reasonable doubt, and we decline to do so here.

[18] Defendant also contends that the death penalty statute fails to provide adequate comparative review procedures. This question was considered in *People v. Brownell* (1980), 79 Ill.2d 488, 38 Ill.Dec. 707, 404 N.E.2d 181, and we decline to reconsider it here.

[19] Defendant also argues that the sentence determine vested in the prosecution by the death penalty statute is an unconstitutional delegation of legislative and judicial authority. This issue was decided in *People ex rel. Carey v. Cousins* (1978), 77 Ill.2d 201, 205-06, 32 Ill.Dec. 197, 395 N.E.2d 555, and will not be further considered here.

[20-22] Defendant's contention that he was denied the effective assistance of counsel at the death penalty hearing requires further discussion. A defendant is entitled to competent, not perfect, representation. *(People v. Green* (1980), 79 Ill.2d 168, 181, 37 Ill.Dec. 543, 402 N.E.2d 611; *People v. Strickland* (1979), 76 Ill.2d 320, 29 Ill.Dec. 488, 392 N.E.2d 1306.) The inadequacy of a defendant's trial counsel matters has to be one that if the opposite occurred there is a reasonable probability that the result of the trial would have been different. *(People v. Erickson* (1983), 97 Ill.2d 532, 535, 73 Ill.Dec. 651, 655, 455 N.E.2d 66; *People v. Strickland* (1979), 76 Ill.2d 320, 29 Ill.Dec. 488, 392 N.E.2d 1306.) Competency is determined from the totality of counsel's conduct at trial. *(People v. Murphy* (1978), 72 Ill.2d 421, 21 Ill.Dec. 546, 381 N.E.2d 671.) It should be noted that defendant complains now of errors made only during the sentencing hearing, and we considered in denial of ineffective assistance of counsel during the trial.

[23] Applying the standard to [illegible] to these and the only [illegible] and was not denied the effective assistance of counsel. [illegible] because of [illegible] to object to the [illegible] argument. Even defendant's counsel had done so, it would reasonably appear that the result of the sentencing hearing would have been different. At the time of the offense defendant was [illegible] and [illegible] to be considered. [illegible] to the [illegible] to be [illegible] to the [illegible] to be [illegible] to the [illegible] to be

51669

[redacted]

March 30, 1984

[redacted]
State Appellate Defender
189 N. Dearborn St., 8th Flr.
Chicago, IL 60602

[redacted]

No. 51669 - People State of Illinois, appellee, vs. Burgin Edmonds, appellant. Appeal, Circuit Court [redacted].

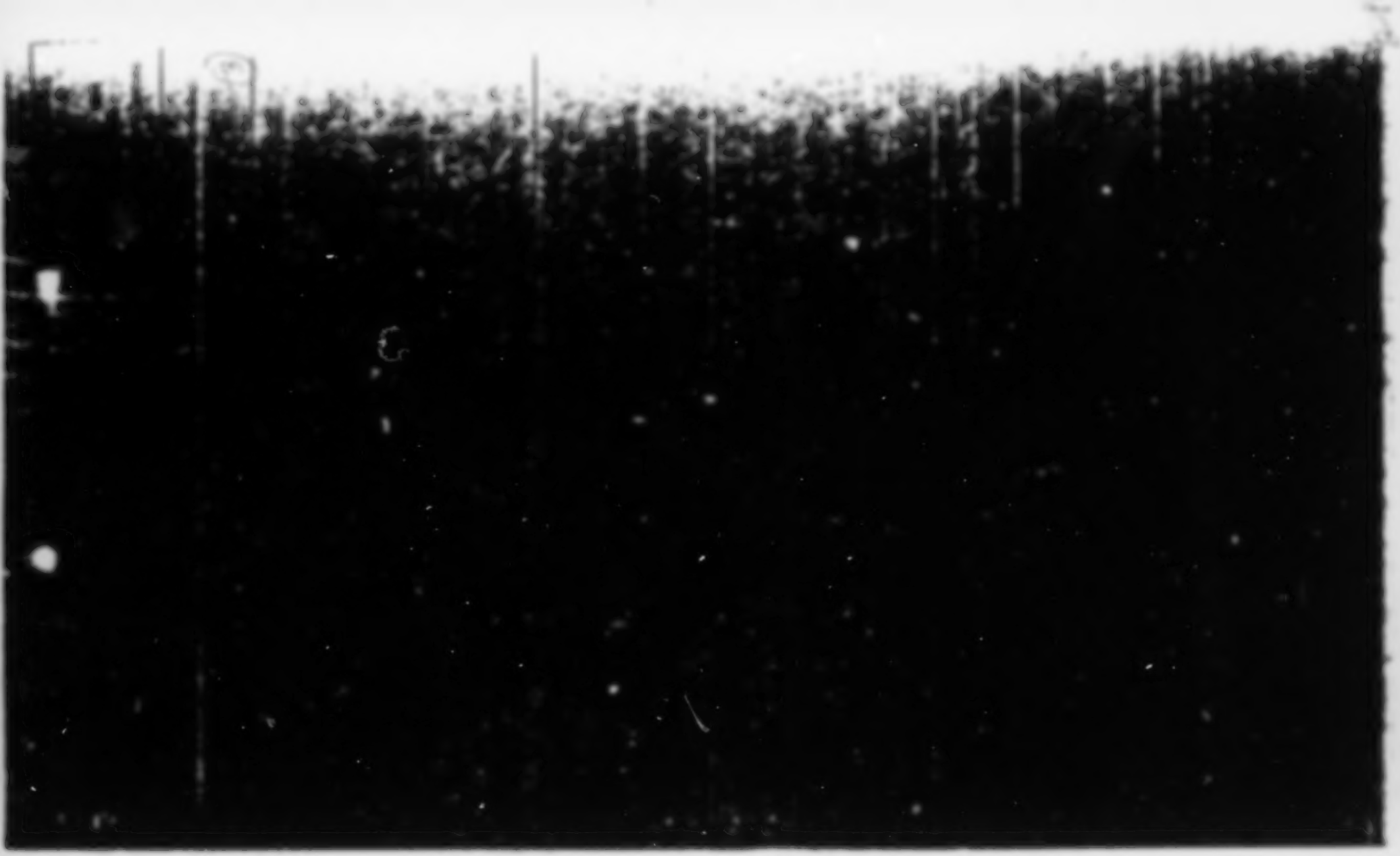
The Supreme Court today [redacted] the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 6, 1984.

We are enclosing a corrected copy of page 9 to the opinion in the above entitled cause. This opinion was sent to you on January 23, 1984.

# RESPONDENT'S

# BRIEF



NO. 80-6002

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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DERLYN EDMONDS

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

---

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

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Whether the Illinois Supreme Court correctly applied principles of due process in holding that there was no bona fide doubt of petitioner's fitness to stand trial where, at the time of trial, psychiatric reports of witnesses more than two years old, those reports were contradicted by more recent reports finding petitioner fit to stand trial, petitioner testified lucidly and purposively on his own behalf and petitioner's trial counsel never brought a fitness issue to the attention of the trial court.

Whether the death sentence is a constitutionally permissible penalty where petitioner, who actually performed the acts which caused the victim's death, acted with, at least, the knowledge that those acts created the strong probability of death or great bodily harm.

Whether the Illinois Death Sentence Statute comports with constitutionally mandated procedures where it guides and informs the sentencing authority in its weighing and balancing of all factors without placing upon petitioner any burden of proof at any phase of the sentencing hearing.

Whether the discretion of the prosecutor to request the death penalty results in the arbitrary imposition of capital punishment where the death penalty statute provides standards that sufficiently focus on the particularized circumstances of the crime and the defendant.

TABLE OF CONTENTS







III.

THE ILLINOIS DEATH SENTENCE STATUTE FULLY COMPORTS WITH CONSTITUTIONALLY MANDATED PROCEDURES BY GUIDING AND INFORMING THE SENTENCING AUTHORITY IN ITS WEIGHING AND BALANCING OF ALL FACTORS WITHOUT PLACING UPON PETITIONER ANY BURDEN OF PROOF AT ANY PHASE OF THE SENTENCING HEARING ..... 11

IV.

THE DISCRETION OF THE PROSECUTOR TO REQUEST THE DEATH PENALTY DOES NOT RESULT IN THE ARBITRARY IMPOSITION OF CAPITAL PUNISHMENT BECAUSE THE DEATH PENALTY STATUTE PROVIDES STANDARDS THAT SUFFICIENTLY FOCUS ON THE PARTICULARIZED CIRCUMSTANCES OF THE CRIME AND THE DEFENDANT ..... 13

AUTHORITIES CITED





NO. 83-6932

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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DARLYN EDMONDS

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

---

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

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The opinion of the Illinois Supreme Court affirming petitioner's conviction and death sentence was entered on January 20, 1984. Petition for rehearing was denied on March 30, 1984. The opinion of the Illinois Supreme Court is reported at 101 Ill. 2d 44, 461 N.E.2d 347 (1984).

## JURISDICTION

Petitioner seeks to invoke the jurisdiction of the Court pursuant to 28 U.S.C. sec. 1257(3). However, as set forth below, petitioner has not presented adequate grounds to warrant a grant of certiorari.



## STATEMENT OF THE CASE

On November 3, 1977, the People of the State of Illinois filed a 6 count indictment charging petitioner with 2 counts of murder, 2 counts of felony murder, indecent liberties with a child and deviate sexual assault. (R. C588-596) The case was not tried until June of 1980. The delay in the proceedings, covering more than 2½ years, was the result of various motions of petitioner for psychiatric examinations relating to his fitness to stand trial and his mental condition at the time of his offenses (See generally R. C570-670). The inquiry into petitioner's mental status began at arraignment in November of 1977, when the judge ordered a "behavioral clinical examination." (R. C570, C599) Pursuant to that order, Dr. Robert Reifman, Assistant Director of the Psychiatric Institute of the Circuit Court of Cook County, reported that petitioner was unfit to stand trial. (R. C604) The trial court then turned petitioner over to the Illinois State Psychiatric Institute which, after examining petitioner for a 2 week period, determined that petitioner was fit. (R. C605) The Public Defender representing petitioner then requested an additional examination by a private doctor to clear up the apparent discrepancy. The private doctor opined that petitioner was unfit to stand trial. (Vol. 2, Supp.R. 52) At this point, in February of 1978, the trial court set the matter down for a fitness hearing. (R. C607; Vol. 2, Supp.R. 52-53)

By May of 1978, the fitness hearing had not been held. At this time Dr. Reifman requested another interview of petitioner to determine petitioner's status. (Vol. 2, Supp.R. 55) Dr. Reifman reported in June of 1978 that based on his re-examination, petitioner was now fit to stand trial with medication. (Vol. 3, Supp.R. C2)

The Public Defender thereafter apparently abandoned his request for a fitness hearing, but asked that petitioner be examined for sanity at the time of his offense. (Vol. 2, Supp.R. 57-58; R. C577, C609) The case was continued on various occasions until March of 1979 for that reason. (R. C577) At that time some confusion again arose on the record in regard to whether or not petitioner was found unfit or had been "restored." (Vol. 2, Supp.R. 59-64) This confusion eventually led to a final psychiatric examination into petitioner's

fitness to stand trial. On May 2, 1979, Dr. Garson Kaplan reported that petitioner was fit to stand trial. (Vol. 3, Supp.R. C3)

The report of proceedings of that date, more than 12 months prior to trial, contains the last mention, whatsoever, of fitness until petitioner filed his brief in the Illinois Supreme Court. Thereafter, petitioner obtained a court-appointed private attorney, who never brought any fitness issue to the attention of the trial court. In June of 1980, petitioner proceeded with a motion to suppress statements during the course of which he testified that his statements to the police implicating him in the murder were entirely the product of improper police coercion. (See generally, R. 98-114) These motions were denied.

The evidence at trial showed that petitioner committed an act of anal intercourse on a 9-year-old boy. During this act, petitioner, to stop the boy's crying and whispering, placed his entire body weight on top of the boy and simultaneously stuffed the boy's face into a pillow. The boy suffocated and perished. (See generally, R. 237-267) Petitioner testified that not he but a friend of his sexually assaulted and killed the boy. This friend later told petitioner that he killed the boy so that the boy would not report the incident. (See generally, R. 385-408)

The trial court found petitioner guilty of murder in that his actions were performed both intentionally and with the knowledge that they created the strong probability of death or great bodily harm. (R. 462) In a separate hearing, the trial court found that petitioner was eligible for the death sentence. (R. 488) After considering further evidence in aggravation and mitigation, the trial court found that there were no mitigating factors sufficient to preclude imposition of the death sentence and imposed the death sentence. (R. 501)



REASONS FOR DENYING THE WRIT

I.

THE ILLINOIS SUPREME COURT CORRECTLY APPLIED PRINCIPLES OF DUE PROCESS ANNOUNCED BY THIS COURT IN HOLDING THAT THERE WAS NO BONA FIDE DOUBT OF PETITIONER'S FITNESS TO STAND TRIAL BECAUSE, AT THE TIME OF TRIAL, PSYCHIATRIC REPORTS OF UNFITNESS WERE WELL OVER TWO YEARS OLD, THOSE REPORTS WERE CONTRADICTED BY MORE RECENT REPORTS FINDING PETITIONER FIT TO STAND TRIAL, PETITIONER TESTIFIED LUCIDLY AND PURPOSEFULLY ON HIS OWN BEHALF AND PETITIONER'S TRIAL COUNSEL NEVER BROUGHT A FITNESS ISSUE TO THE ATTENTION OF THE TRIAL COURT.

Petitioner points to two psychiatric reports, both submitted well over two years prior to trial, stating that he was unfit to stand trial and submits that these reports alone raised a bona fide doubt of his fitness to stand trial which existed when he stood trial. Petitioner mistakenly equates ordering a fitness hearing with having a bona fide doubt of fitness at the time of trial. That mistake, in turn, leads petitioner to wholly ignore the totality of facts before the court at the time of trial.

It is beyond question that conviction of a person who is in fact unfit to stand trial violates due process of law. Pate v. Robinson, 383 U.S. 375, 378 (1966). State courts, therefore, must observe procedures adequate to protect a person's right not to be tried while unfit, and failure to do so violates a defendant's due process right to a fair trial. Id.; Drope v. Missouri, 420 U.S. 162, 172 (1975).

In Pate, this Court noted that "[t]hese statutory guards [the right [.]F Pate v. Robinson, 383 U.S. at 385, through statutory provisions for a fitness hearing if evidence raises a bona fide doubt of a defendant's fitness to stand trial. This Court, however, held that the state court violated Robinson's due process rights when it failed to invoke the procedures set forth by Illinois

statute. In holding that Robinson was constitutionally entitled to a hearing on the question of his fitness to stand trial, this Court looked primarily to "the uncontradicted testimony of Robinson's history of pronounced irrational behavior." Id. at 385-386. On the facts of that case, the Court held that a prior psychiatric finding of fitness and Robinson's apparent rational behavior at trial could not provide the basis for ignoring the extensive evidence of Robinson's irrational behavior to dispense with a hearing. The Court also noted, in holding that this issue had not been waived, that Robinson's trial attorney continuously raised the issue of his fitness to stand trial. Id. at 384.

In Drope v. Missouri, 420 U.S. 162 (1975), the Court clarified its decision in Pate:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts. [420 U.S. at 180.]

Even a cursory review of the opinion and record below indicates that the Illinois Supreme Court correctly applied these principles to the facts at hand. At the time of trial, the only indications of unfitness appearing anywhere on the record were the reports of two psychiatrists in December of 1977 and February of 1978. Both of those reports were issued well over two years before trial which commenced in June of 1980. One of those reports was submitted by a doctor who, in a subsequent examination of petitioner in June of 1978, found petitioner fit to stand trial. Additionally, the last report about fitness, which was submitted over a year after the reports of unfitness and still 10 months prior to trial, stated that petitioner was fit to stand trial.



Moreover, immediately before trial the trial judge had the benefit of observing petitioner testify in support of his motions to quash arrest and suppress evidence to the effect that his confession was the involuntary product of police misconduct. The trial court itself conducted a comprehensive examination of petitioner, and persisted in its examination until it had satisfied itself that petitioner understood all of the charges and the nature of the proceedings about to commence. Petitioner also testified at trial that not he, but a friend of his, had abducted, sexually molested and then killed the victim because the victim was going to tell on him. Petitioner's testimony at the suppression hearing and at trial indicated an understanding of both proceedings and his attempts to avoid conviction for his hideous crimes. His testimony was purposive and negated doubt of his fitness to stand trial.

Finally, petitioner's trial counsel, though certainly not an expert in psychiatry, would certainly have been the first to know if petitioner did not understand the proceedings or was unable to assist in his defense. While an attorney's failure to raise the issue of fitness does not, in itself, indicate the absence of a bona fide doubt, it is highly unlikely that counsel sensitive to this issue would not have raised it had he noted any problems with his client's ability to understand the proceedings or assist in his defense. See Owens v. Sanders, 681 F.2d 564, 566 (6th Cir. 1981). Yet from the time petitioner's trial counsel appeared on May 12, 1978, through trial and sentencing in June and July of 1980, petitioner's trial counsel never mentioned the issue of petitioner's fitness to stand trial. His silence therefore could only indicate to the trial court that any doubts he might have had were allayed by the most recent psychiatric reports, by petitioner's conduct or both. Id.

In sum, the remoteness of the initial reports of unfitness, the fact that petitioner's condition well over 2 years before trial was not a permanent or continuing condition as indicated by later reports which found petitioner fit, petitioner's lucid, purposive participation in his own trial, the fact that the trial court satisfied itself that petitioner understood the charges and the nature of the proceedings, and petitioner's lawyer's apparent realization that petitioner was fit to stand trial, taken together, lead to the inescapable conclusion that at the time of trial, no bona fide doubt of petitioner's fitness for trial existed. The Illinois Supreme Court, in its opinion, noted these factors and correctly applied this Court's decisions in so holding. See People v. Eddmonds, 101 Ill. 2d 44, 56-57, 461 N.E.2d 347, 353 (1984). Accordingly, the writ should be denied.

II.

THE DEATH PENALTY IS CERTAINLY A CONSTITUTIONALLY PERMISSIBLE PENALTY IN THIS CASE BECAUSE PETITIONER, WHO ACTUALLY PERFORMED THE ACTS WHICH CAUSED THE VICTIM'S DEATH, ACTED WITH, AT LEAST, THE KNOWLEDGE THAT THOSE ACTS CREATED THE STRONG PROBABILITY OF DEATH OR GREAT BODILY HARM.

Even though petitioner suffocated his nine-year-old victim in order to stop the victim from crying out in the course of petitioner's sexual assault upon him, petitioner asks this Court to grant certiorari to determine whether it makes a constitutional difference that petitioner performed his acts with the specific intent to kill or with the knowledge that his acts created the strong probability of death or great bodily harm. Respondent submits that the slight difference in degree between the two mental states outlined by the Illinois statute does not merit this Court's attention in light of the fact that the evidence in this case shows both that the petitioner killed and that he, at least, contemplated that by performing the acts which caused death, a life would be taken. This case is, therefore, a particularly inappropriate one to review whether a death sentence may ever be imposed in the absence of a specific intent to kill.

Initially, respondents must note that they can not agree with petitioner's assertions that there was no evidence that petitioner acted intentionally and that the trial judge rejected the argument that the killing was intentional. (See Pet. at 9-10) The evidence at trial showed that petitioner, while engaged in an act of deviate sexual assult on his nine-year-old, 55 pound victim, smothered the victim under his 125-pound frame while shoving the victim's face into a pillow. Though petitioner claimed in his statements to the police that the victim's death was an accident, the trier of fact was not required to believe that assertion. The surrounding facts and circumstances revealed that petitioner was fearful of being caught having illicit sexual relations with a 9-year-old boy, whom petitioner had attacked in his own apartment. Those facts support the conclusion that petitioner intentionally killed the victim to avoid capture and prosecution. The Illinois Supreme Court noted that from the acts petitioner



admitted to performing, the trial judge was entitled to infer the requisite mental state and to reject petitioner's claim that he did not intend to kill the victim. Peach v. Edmonds, 101 Ill. 2d 44, 62, 461 N.E.2d 347, 356 (1984).

Moreover, in sentencing petitioner, the trial judge did not reject his own finding that petitioner intentionally killed the victim. Petitioner, in so stating, refers this Court to the trial court's comments when he imposed sentence, and did not specifically mention intent to kill. (S. 580; Pet. at 10) Yet, the same trial judge who imposed sentence made a specific finding of guilt under Ill. Rev. Stat. 1977, ch. 38, par. 9-1(a)(1), based on intent to kill. (R. 467) That finding of guilt was on the same evidence that was presented, by stipulation, to the trial court in the eligibility phase of sentencing when the trial court determined that the People proved an aggravating factor beyond a reasonable doubt. Ill. Rev. Stat. 1979, ch. 38, para. 9-1(b), (7), (h). The trial court found, based on the stipulated evidence, that petitioner was eligible for the death sentence. (R. 480) Because the trial court had already found that petitioner intended to kill his victim and that he was eligible for the death sentence under the applicable paragraphs of the statute, the fact that he did not mention intent when he finally imposed sentence is a wholly inconsequential fact not relevant to the inquiry made at that point, i.e., whether or not there were any "mitigating factors sufficient to preclude the imposition of the death sentence..." Ill. Rev. Stat. 1977, ch. 38, par. 9-1(g). It therefore remains apparent on the record that petitioner did intentionally kill his victim, obviating any need for this Court to consider petitioner's issue.

Assuming, nevertheless, that petitioner had performed the acts which caused death unintentionally, but with the knowledge that they created the strong probability of death or great bodily harm, the death sentence is, nevertheless, appropriate under this Court's decision in Enmund v. Florida, 458 U.S. 782 (1982). In Enmund it was held that a person could not be sentenced to death for the actions of his accomplices where he neither killed, attempted to kill, nor intended or contemplated that a life might be taken. Id. at 801. In the instant case, petitioner did kill and, in knowing that his acts created the strong probability of death or great bodily harm, he contemplated that a life might be taken. Petitioner's killing is particularly egregious in that he killed so that he could conclude his violent, felonious sexual attack on his 9-year-old victim.

Petitioner attempts to bolster his petition in this regard by stating that the decision of the Illinois Supreme Court in the instant case is in conflict with Clark v. Louisiana State Penitentiary, 654 F.2d 75 (1982), because Clark holds that there must be a specific finding of intent to kill to impose a death sentence. No such conflict exists, however, because the Court in Clark did not so hold. In Clark, the court referred to Enmund, stating that the death penalty is inappropriate for one who "does not kill or contemplate the taking of a life." Id. at 76-77 (Emphasis added). As noted by petitioner, the court also stated the jury must find beyond a reasonable doubt that "Clark, personally, did have that mind to kill." Id. at 78. That, of course, is exactly what was stated in Enmund and is no more. The court in Clark spoke only of specific intent to kill because the Louisiana statute involved there provided only for the death penalty where there was a specific intent to kill. Id. at 76. The court in Clark said no more about imposing the death penalty in the absence of a specific intent to kill than did this Court in Enmund, where this Court commented that death was constitutionally appropriate where the defendant took life and contemplated that a life might be taken. Petitioner certainly contemplated that his acts would cause death. Accordingly, the writ should be denied.





THE ILLINOIS DEATH SENTENCE STATUTE FULLY COMPORTS WITH CONSTITUTIONALLY MANDATED PROCEDURES BY GUIDING AND INFORMING THE SENTENCING AUTHORITY IN ITS WEIGHING AND BALANCING OF ALL FACTORS WITHOUT PLACING UPON PETITIONER ANY BURDEN OF PROOF AT ANY PHASE OF THE SENTENCING HEARING.

Petitioner alleges that the Illinois death sentence statute creates a rebuttable presumption that death is the appropriate sentence and that he thereby bears the burden to rebut that presumption in violation of the United States Constitution. Respondent submits that petitioner's interpretation of the statute is contrary to the express language of the statute as well as the interpretation of the Illinois Supreme Court that the statute creates a balancing process by which the sentencing authority's discretion is guided and limited to avoid arbitrary and capricious imposition of the death penalty.

The Illinois statute provides for a two-part hearing. In the first part the State must prove the existence of a statutorily enumerated aggravating factor beyond a reasonable doubt. Ill. Rev. Stat. 1977, ch. 38, par. 9-1(b). If that determination is made, the hearing proceeds to a second phase where the sentencing body again considers aggravating factors but now in conjunction with any mitigating factors. The sentencing authority must then unanimously determine that there are no mitigating factors sufficient to preclude imposition of the death sentence. Ill. Rev. Stat. 1977, ch. 38, par. 9-1(g), (h). The Illinois Supreme Court has determined that this second phase of the sentencing hearing creates a guided and limited balancing process, without imposing any burden of proof on either party. See People v. Brownell, 79 Ill. 2d 555, 574, 404 N.E.2d 181, 189 (1980).

As such, the procedures provided in the Illinois statute fully comport with the requirements enunciated by this Court in Proffitt v. Florida, 428 U.S. 242 (1976), and Gregg v. Georgia, 428 U.S. 153 (1976), that the sentencing body be guided and informed in its weighing and balancing of all factors, but without being relegated a perfunctory and mechanical task. These procedures legitimately broaden the function of the sentencing body beyond that of a trier of fact to allow consideration of petitioner's character and propensities. See Gregg v. Georgia, supra

Petitioner's additional argument that the Illinois statute creates a mandatory penalty, simply misconstrues the context of "mandatory" as discussed in Roberts v. Louisiana, 431 U.S. 633 (1977), and Woodson v. North Carolina, 428 U.S. 280 (1976). In those cases the Louisiana and North Carolina statutes were struck down because they provided mandatory death sentences for certain offenses without any consideration of the nature of the surrounding offense and the offender's individual character and preparation. The Illinois statute requires the death sentence only after the offense and the offender's background have been fully explored and the sentencing authority has reached a determination that there are no mitigating factors sufficient to preclude imposition of the death sentence. The statute is in no way "mandatory" in terms of Roberts and Woodson. Accordingly, the writ should be denied.



IV.

THE DISCRETION OF THE PROSECUTOR TO REQUEST THE DEATH PENALTY DOES NOT RESULT IN THE ARBITRARY IMPOSITION OF CAPITAL PUNISHMENT BECAUSE THE DEATH PENALTY STATUTE PROVIDES STANDARDS THAT SUFFICIENTLY FOCUS ON THE PARTICULARIZED CIRCUMSTANCES OF THE CRIME AND THE DEFENDANT.

Petitioner contends that the Illinois Death Penalty Statute violates the Eighth Amendment in that, by giving prosecutors discretion to seek the death penalty, the statute creates a substantial risk that the penalty will be imposed in an arbitrary and capricious manner. Respondent submits that when the statute is analyzed, it is clear that the specific statutory aggravating and mitigating factors provide sufficient standards to prevent the uneven imposition of capital sentences.

This Court, in Gregg v. Georgia, 428 U.S. 153 (1976), rejected an argument that the prosecutors had "unfettered authority" to select those prosecuted for capital offenses. In upholding the discretion to show mercy at any stage of the proceedings, this Court stated that:

> Nothing in any of our cases suggests that the discretion to afford an individual defendant mercy, violates the Constitution. Furman [Furman v. Georgia, 408 U.S. 238 (1972)] held only that in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant. [428 U.S. at 199]

In Gregg, the Georgia prosecutor's power to charge a capital offense was confined by the statutory definition of that offense, with the decision depending upon his estimate of what testimony and other evidence would be available and its persuasive effect.

Despite the petitioner's contention, the enumerated statutory aggra-

vating and mitigating factors provide Illinois prosecutors with sufficient standards by which to make the decision to request, or not request, a death penalty hearing. A murder can be a capital offense only if it falls within one of the statutorily defined classes. Ill. Rev. Stat. 1979, ch. 38, sec. 9-1(b). The statutory mitigating factors, see sec. 9-1(c), must be the starting point for any decision to show mercy. Even when the prosecutor requests a death penalty hearing in the case of a particular defendant, a judge or jury must conduct the statutorily prescribed hearing, and consider the statutorily prescribed standards in determining whether or not the death penalty should be imposed. Moreover, the Illinois prosecutor's judgment will be better informed than under the Georgia procedure approved in Gregg, "for he need not make the final decision until after the conclusion of trial, when he will have evaluated the testimony and other evidence which was in fact presented." People ex rel. Carey v. Cousins, 77 Ill. 2d 531, 543, 397 N.E.2d 809, 815 (1979), cert. denied, 445 U.S. 953 (1980).

As a matter of federal constitutional law, the concurring opinion of Justices White, Burger and Rehnquist in Gregg, is also instructive:

> Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. [428 U.S. at 224-25]

Thus, the prosecutor's exercise of discretion under the Illinois law



does not affect the constitutionality of the statute by rendering it susceptible to arbitrary or capricious application. Petitioner's further claim that this Court should grant certiorari to clear up a dispute among the justices of the Illinois Supreme Court thus merits no consideration, for the majority position in Illinois, whether or not determined in part by principles of stare decisis, is a correct interpretation of federal constitutional law. Accordingly, the writ should be denied.

## CONCLUSION

For the reasons stated the People of the State of Illinois respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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# OPINION

# SUPREME COURT OF THE UNITED STATES

## DURLYN EDMONDS v. ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 83-6505. Decided October 9, 1984

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I would grant certiorari to consider the constitutionality of the Illinois death penalty statute, which vests in the prosecutor the unlimited and unguided discretion to trigger death sentencing proceedings. Under the statute, a death sentencing proceeding will follow a conviction for a crime punishable by death only "[w]here requested by the State." Ill. Rev. Stat., ch. 38, ¶9-1(d) (Supp. 1984). If the prosecutor chooses not to request such a proceeding, the defendant cannot be sentenced to death.

Yet the prosecutor's decision whether to make this request is not guided by any legislative standard. Thus, the Illinois scheme introduces unbridled discretion at a stage at which "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (joint opinion announcing the judgment of the Court). Accordingly, a substantial question is presented as to the constitutionality of the statute.

I

At the outset, it is important to state clearly what this case is not about. It is not about prosecutorial discretion in an area traditionally committed to such discretion. The discretion at issue here is fundamentally different from the discretion a prosecutor exercises in determining whether to seek an indictment for an offense punishable by death, or to

accept a plea of guilty to a lesser included offense. What is at stake, instead, is standardless discretion at the post-conviction phase of capital cases—the phase in which this Court has repeatedly emphasized that discretion must be carefully guided.

The joint opinion announcing the Court's judgment in *Gregg* v. *Georgia*, *supra*, carefully distinguishes pre-conviction discretion—which it deems permissible—from post-conviction discretion—which, it states, can render a scheme unconstitutional. That opinion makes clear that unguided discretion at the latter stage is impermissible: "[T]he decision to impose the death sentence on a specific individual who ha[s] been convicted of a capital offense" must be guided by standards and cannot be imposed on a "capriciously selected group of offenders." *Id.*, at 199 (Stewart, J., joined by POWELL and STEVENS, JJ.).

II

In my mind, there are serious questions about the constitutionality of a scheme that gives the prosecutor the unbridled discretion to select, from the group of individuals convicted of an offense punishable by death, the subgroup that will be considered for death. The Court has focused its concern in death penalty cases on the decision of which defendants, among the many convicted of offenses punishable by death, will actually receive the death penalty. See, e. g., *Pulley* v. *Harris*, 465 U. S. ——, —— (1984); *Lockett* v. *Ohio*, 438 U. S. 586, 606–605 (1978). It is at this stage—in which the focus of the proceedings shifts from the nature of the crime to the nature of the defendant—that arbitrariness, discrimination, and irrationality are most likely to infect the decision whether a defendant will live or die. To minimize the potential for these abuses, the Court has consistently required that, following conviction of an offense punishable by death, discretion in determining who will receive the death penalty be limited by statutory standards.



The Illinois scheme differs from schemes this Court has approved in that capital sentencing proceedings in Illinois do not inexorably follow conviction for a crime punishable by death. Instead, the prosecutor has the authority—and the duty—to narrow down the class of convicted defendants. Yet the Illinois statute does not set any standards to guide that decision. Such unguided discretion cannot help but produce the sort of arbitrary, capricious, and discriminatory application of the death penalty that is simply intolerable under *Furman* v. *Georgia*, 408 U. S. 238 (1972). Because the prosecutor has no standards to guide his post-conviction decision, the Illinois scheme eliminates any "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.*, at 313 (WHITE, J., concurring).

The potential for arbitrariness in the imposition of the death penalty is further exacerbated because the decision to initiate sentencing proceedings is not vested in one individual, but in the State's Attorneys of each of the State's 102 counties. Each of these 102 individuals, subject to the different political pressures of his own constituency, can establish his own policy—or no policy at all—on how to narrow the group of individuals convicted of crimes punishable by death, and in this endeavor he is not aided by any legislatively imposed standard or limited by any legislatively imposed constraint. *People ex rel. Carey* v. *Cousins*, 77 Ill. 2d 521, 527–528, 397 N. E. 2d 809, 822 (1979) (Ryan, J., dissenting); see *People* v. *Lewis*, 88 Ill. 2d 129, 182, 430 N. E. 2d 1346, 1376–1377 (1981) (Simon, J., dissenting). In such a system, there will often be no rational distinction between an individual who receives the death penalty and one who does not.

III

The post-conviction discretion that the Illinois statute vests in prosecutors is particularly pernicious because it is coupled with the absence of a clear requirement of comparative pro-

*proportionality review of death sentences on appeal.* The Illinois death penalty statute does not mandate such review, and the Illinois Supreme Court has been ambiguous about whether it would ever engage in analysis of this type. See *People* v. *Kubat*, 94 Ill. 2d 437, 502–504, 447 N. E. 2d 247, 277–278 (1983); *People* v. *Brownell*, 79 Ill. 2d 508, 541–544, 404 N. E. 2d 181, 198–199 (1980). Thus, the scheme does not at any stage assure that like cases in Illinois are treated alike, and provides no mechanism to prevent against arbitrary, capricious, or discriminatory winnowing of defendants convicted of crimes punishable by death.

Central to the Court's decision in *Pulley* v. *Harris*, 465 U. S. —— (1984), that comparative proportionality review is not in all capital cases constitutionally required was the fact that the scheme provided adequate standards to guide the decision whether individuals convicted of first-degree murder should be sentenced to death. Given such standards, the Court did not see much potential for arbitrary and capricious action. *Id.*, at ——. But the Court did state clearly that comparative proportionality review is a safeguard, *id.*, at ——, and that it might be constitutionally required in a scheme that did not contain sufficient other adequate safeguards, *id.*, at ——.

Under the Illinois scheme, there are no standards to guide an important part of the decision as to which defendants, among those convicted of crimes punishable by death, are actually sentenced to death. Thus, even if prosecutors try to act responsibly—whatever this might mean under the scheme—consistency is unattainable because they have no standards to guide their actions. The safeguards identified in *Pulley* might adequately protect the rationality of the death sentencing process once the prosecutor has initiated that process, but they in no way assure consistency across the spectrum of defendants who are convicted of offenses punishable by death. Thus, without comparative proportionality review, there is absolutely no guarantee that similarly situated defendants, charged and convicted for similar crimes, will not be treated differently. Irrationality and arbitrariness, even discrimination, are likely to be the norm.



IV

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and the Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S., at 231 (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S., at 314 (MARSHALL, J., concurring). The issue in this case, however, is such that I would grant review of the sentence even if I accepted the prevailing view that the death penalty may be constitutionally imposed under certain circumstances. The Illinois death penalty statute vests in the prosecutor unbridled discretion at a stage in the proceedings at which the Court has consistently stated that discretion must be channelled to prevent the arbitrary, capricious, and discriminatory application of the death penalty. The consideration of the constitutionality of this statute is, I believe, worthy of the attention of this Court. For that reason, I respectfully dissent.